IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.9850 of 2007 and
M.P.No.2 of 2007

Tvl.Ramana Sekhar Steels Ltd.,
Rep. By A. Ramana Sekhar
100 Rasappa Chetty Street,
Chennai - 3. ... Petitioner

Vs.

The Commercial Tax Officer,
Manali Asst Circle,
Chennai. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari calling for the records on the file of the respondent in TNGST 1082672/2002-2003 dated 19.1.07 quash the same being illegal and arbitrary.

For Petitioner : Mr.S.N.Kirubanandam

For Respondent : Mr.K.Venkatesh
Government Advocate

ORDER

Heard Mr.S.N.Kirubanandam, learned counsel for the petitioner and Mr.K.Venkatesh, learned Government Advocate appearing for the respondent.

2.The petitioner is aggrieved by the order of assessment passed by the respondent dated 19.01.2007 under the provisions of the Tamil Nadu General Sales Tax Act, 1959 for the assessment year 2002-2003.

3.The allegation against the petitioner was that during the course of inspection of their business premises, it was found that the petitioner had effected transactions with M/s.Kamalesh Enterprises, M/s.Aashana Enterprises and M/s.Shreyansh Isphat (P) Limited and those companies are bill traders. Based on this conclusion, the assessment was completed and tax and penalty was demanded. Identical issue came up for consideration before this Court in the case of M/s.Salem Steel Suppliers, Chennai and others V. The Deputy Commissioner (CT), Chennai (North)

Division, Chennai, in W.P.Nos.24437 of 2004 etc. batch. The said batch of cases, certain writ petitions were filed challenging revision notices and other writ petitions challenging assessment orders and the allegation in the said batch of cases was identical to that of the allegation in the present writ petition that the petitioner had effected transactions with the three companies mentioned above who are bill traders. The Court had elaborately heard the learned counsels and allowed the writ petitions, by common order, dated 08.08.2017. The operative portion of the order reads as follows:

> "12. Section 32 of the TNGST Act confers special power on the Deputy Commissioner, who, on his own motion, call for and examine an order passed or proceedings recorded by the appropriate Authority under Section 4-A, Sub-Section (3) of Section 10, Section 12, 12-A, 14, 15 , or sub-Sections (1) and (2) of Section 16 and if such order or proceedings recorded is prejudicial to the interests of the Revenue, the Deputy Commissioner may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise or modify or set aside such order or proceeding. The power of sub-section (1) of Section 32 shall not be exercised if, i) the time for appeal against the order has not expired; ii) order has been made the subject of an appeal or a revision and iii) more than five years have expired after the passing of the order. Thus, the power under Section 32 is a suo-moto power, to scrutinize the orders of the Assessing Officer, which have been passed under various provisions stated above.
>
> 13.Bearing in mind the above two statutory provisions, if we examine the impugned notices, it is seen that the notices issued to the petitioners contain seven pages, which are common to all the petitioners. In fact, these seven pages appear to be photo stat copies, which are commonly prepared and the name of the dealer has been filled up in hand at the appropriate place. Thus, the entire purpose behind issuing impugned notices is to re-open the concluded assessment. The averments set out in the impugned notices do not reveal that any independent enquiry has been done by the first respondent before issuing the impugned

notices. In fact, identical notice was issued to the petitioner in W.P.No.24437 of 2004 (M/s.Salem Steel Suppliers) for the assessment year 1999-2000, dated 10.06.2004, and curiously enough, the allegations, that are made in the present impugned notices were contained in the said earlier notice also.

14.Thus, the pattern adopted by the first respondent is identical to that of the pattern adopted by the respective Assessing Officers for either earlier or subsequent assessment years. Hence, the first respondent had no new material to come to the conclusion that the assessments have to be re-opened, as it is prejudicial to the interest of the Revenue, and he forms such opinion on enquiry being made. If that is the factual position, then, obviously, the first respondent cannot exercise the powers, what could not have been done by the Assessing Officer, as the statement was recorded much after the assessments were completed, and the same are clearly barred by limitation, as it is beyond the period of five years. At this juncture, it is relevant to note that, the Hon'ble Division Bench, in the case of A.Velayutha Raja (cited supra) has pointed out that the revisional powers exercised by the Board of Revenue under Section 34 of the Madras General Sales Tax Act, 1959, are subject to the other provisions of the Act, and therefore, a best Judgment assessment or an original assessment by the Board under Section 34 on the ground of escapement of turn over is bad in law and unsustainable. It is not a mere subjective satisfaction that is envisaged in Section 34, but, it should stand the test of objectiveness as also prescribed guidelines set in the section itself, and it should be in accord with the other provisions of the Act. It was further pointed out in the said case that the provisions as to the period of limitation, within which, escaped turnover can be brought to tax as provided in Section 16(1) equally apply, when such an order is sought to be passed by the Board in exercise of its powers under Section 34.

15.The power under Section 16(1) is wide enough and cannot be said to be limited to assessment of assessable turnover under that sub-section by the Assessing Authority only. It is to be invoked in all cases, where, a statutory functionary under the Act assumes jurisdiction to assess the escaped turnover. Therefore, it was held that, in passing an original order of assessment, the Board exceeded its powers under Section 34, and that the order was also passed beyond time. Therefore, the order was held to be unenforceable in law.

16.Following the decision rendered in the case of A.Velayutha Raja (cited supra), the Hon'ble Division Bench, in the case of Reliance Motor Company Private Limited (cited supra), while examining the power of the Joint Commissioner under Section 34 of the TNGST Act to bring the escaped turnover to tax, when it was neither a subject matter of assessment proceedings nor appellate proceedings, it was held that, 'even if the Joint Commissioner could otherwise have brought the escaped turnover to tax for the first time, since the notice issued by him was beyond the period of limitation prescribed under Section 16 (1) of the Act, the order passed by him was without jurisdiction'.

17.In the case of (M.M.Mohideen Thamby & Co. Vs. The Deputy Commissioner) reported in (1996) STC Mad 87, it was contended that the Deputy Commissioner has no jurisdiction to enhance the turnover and the revision was barred by limitation. After taking note of Sections 16 and Section 32 of the TNGST Act, the Hon'ble Division Bench pointed out that, according to Section 16(1)(a), where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of the sub-section (2) at any time, within a period of 5 years from the expiry of the year to which the tax relates, determine to the best of its judgment, the turnover, which has escaped the assessment, and assess the tax payable on such turnover after making such enquiry, as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment. Therefore, even if a direction was given by the Deputy Commissioner to reopen the assessment, the Assessing Officer can reopen the assessment only if there is a period of five years for reopening as contemplated under Section 16(1)(a) of the Act.

18.In the case of P.Narayanasamy (supra), the question was whether, while exercising jurisdiction under Section 34 of the TNGST Act, 1959, the Joint Commissioner can revise the order passed by the authorities below only on the basis of the materials available on record. The Hon'ble Division Bench held that the Joint Commissioner cannot rely upon the extraneous materials, which were not on record before the order was passed by the lower authorities.

19.In the instant case, the material sought to be relied upon was available with the Assessing Officer for the relevant assessment year. As noticed, the Assessing Officer himself, in the subsequent assessment orders has referred to the very same materials, which are contained in the earlier notice, and hence, the impugned notices are unsustainable. One more important factor to be noted is that the petitioners' sellers, viz., i) M/s. Aashana Enterprises, ii) M/s.Kamelesh Enterprises, and iii) M/s. Shreyanash Ispat Chennai, Pvt. Ltd. have been assessed to tax for the assessment year, viz., 1998-99 vide the assessment orders, dated 16.02.2000, 14.02.2000 and 27.01.2000, and those assessment orders are intact, and this one more reason to hold that the impugned notices are unsustainable.

20.For the above reasons, it is held that the impugned notices are wholly without jurisdiction. Accordingly, Writ Petition Nos.24437, 26998, 27330 and 27345 of 2004 are allowed and the impugned orders are quashed.

II) W.P.No.34269 of 2004

21.Insofar as W.P.No.34269 of 2004 is concerned, the legal issue involved herein is squarely governed by the orders passed by this Court in the aforementioned four Writ Petitions, viz., W.P.Nos.24437, 26998, 27330 and 27345 of 2004, following the same, W.P.No.34269 of 2004 is also allowed, and the impugned order is set aside. No costs.

22.In the result, all these Writ Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed."

4.The learned Government Advocate appearing for the respondent does not dispute the above legal position.

5.Thus, following the earlier decision of this Court, the Writ Petition is allowed and the impugned order is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

Sgl

To

The Commercial Tax Officer,
Manali Asst Circle,
Chennai.

+1cc to Mr.S.N.KIRUBANANDAM Advocate, S.R.No. 79053

+1cc to the Special Government Pleader, S.R.No. 78968

W.P.No.9850 of 2007

TR(27/11/2017)